



**INDIANA COURT OF APPEALS
ORAL ARGUMENT AT A GLANCE
NORTH CENTRAL HIGH SCHOOL**

JOHN B. LIND v. MENARD, INC. AND SCOTCH CORPORATION

Appeal from:
Lake Superior Court
The Honorable William E.
Davis, Judge

Oral Argument:
Tuesday, January 15, 2008
9:30—10:10 a.m.
20 minutes each side

CIVIL LAW

Did the trial court err in concluding there was no genuine issue of material fact regarding the adequacy of, and Lind's disregard for, Scotch's warnings and directions?

CASE SYNOPSIS

Facts and Procedural History

On June 18, 2004, Plaintiff John Lind purchased a bottle of Guaranteed Hair & Grease Drain Opener, a product manufactured by Defendant Scotch Corporation, from Menards in order to unclog a drain in a bathtub at his home. Upon returning home, Lind read the warnings and instructions on the bottle, including the warnings to "Always wear safety goggles and rubber gloves" and to "Wear suitable protective clothing, gloves and eye/face protection." Lind wore eye-glasses and wrapped the bottle in a towel, but he did not wear goggles or rubber gloves. Lind then poured approximately two cups of the product into the clogged drain and waited one hour, as the instructions directed. He then flushed the drain with

lukewarm water. The instructions directed the user to flush the drain with hot water. The drain remained clogged, so in an effort to find the blockage, Lind went to his basement and tried to remove the cap from the drum trap linked to the drain line. The cap exploded off of the drum trap. Lind suffered injuries including the loss of his left eye and loss of partial vision in his right eye, as well as scarring of his face and chest.

Following Lind's action against Scotch for damages, Scotch moved for summary judgment, claiming Lind had failed to establish a prima facie case and that his contributory negligence barred any recovery. The trial court granted summary judgment in favor of Scotch on the basis that there was no dispute regarding Lind's disregard for the directions and warnings on the product label.

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Parties' Arguments



Under Indiana Trial Rule 56(C), summary judgment is appropriate when the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Under Indiana Code section 34-20-4-2 (2005), a product is defective if a seller fails to (1) properly package or label the product to give reasonable warnings of danger about the product; or (2) give reasonably complete instructions on proper use of the product.

Lind first challenges the trial court's summary judgment order by arguing that there was a genuine issue of material fact regarding whether Scotch provided reasonable warnings of danger. Specifically, Lind claims the warnings were inadequate in that they failed to indicate that the product would remain caustic after it had been applied and diluted and after its work life—here, one hour—had passed. Lind further claims the warnings were inadequate because they understated the degree of danger, warning only of the risk of burns rather than of immediate blindness. In support of his argument, Lind points to Scotch's warnings on other drain cleaning products indicating both the continuing existence of a danger after the product is applied and the drain remains clogged, as well as of the specific risk of blindness.

Lind additionally challenges the trial court's summary judgment order by arguing that there was a genuine issue of material fact regarding whether the instructions were reasonably complete. On this point Lind claims that the instruc-

tions presumed that the product would work and provided no additional instructions in the event that the product did not work as guaranteed.

In response, Scotch points to Indiana Code section 34-20-5-1 (2005), which provides for the rebuttable presumption that a product causing physical harm is not defective if it conforms to the generally recognized state of the art applicable to the safety of the product at the time it was designed, manufactured, packaged, and labeled, or if it complies with applicable codes, standards, regulations, or specifications. Scotch argues that its consultant, Mr. Andrew Le Cocq, determined that the warnings at issue were in compliance with applicable standards and that Lind did not rebut this determination. Scotch argues that Lind's challenges to the warnings and instructions cannot overcome this statutory presumption.

Scotch further disputes Lind's claim that the designated evidentiary matter regarding the reasonableness of the warnings and the completeness of the instructions shows genuine issues of material fact. With respect to the warnings, Scotch argues that, as a matter of law, a warning cannot be deemed inadequate if the product is used in a manner specifically warned against by the label. Scotch claims that Lind's admitted use of the product without gloves or goggles and without using hot water or

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repeating the application when it proved ineffective was such a manner specifically warned against. With respect to the completeness of the instructions, Scotch argues that the instructions directed the user, for optimal results, to wait overnight, and further, to “Repeat if necessary.” According to Scotch, Lind’s claim that the instructions were incomplete is based on the faulty premise, not borne out by the undisputed evidence, that the instructions did not provide further direction in the event that the product did not work within the specified period.

TODAY'S PANEL OF JUDGES

Hon. Carr L. Darden (Marion County), Presiding

- Judge of the Court of Appeals since October 1994

Carr L. Darden was named to the Indiana Court of Appeals by Governor Evan Bayh in October 1994. Prior to his appointment, he served as a presiding judge in the Marion County Superior Court and the Marion County Municipal Court systems. He also served as the Chief Deputy State Public Defender.

Judge Darden received his BS degree from Indiana University School of Business in 1966 and his JD degree from Indiana University School of Law in Indianapolis in 1970. He is also a 1998 graduate of the Judicial College of Indiana and, in 2004, the Indiana Graduate Program for Judges.

He is a native of Nashville, Tennessee but has lived in Indiana most of his life; therefore, he is a proud Hoosier by choice. He and his wife, Lundy Marie, recently celebrated their 50th wedding anniversary.

Judge Darden considered it an honor to serve in the United States military and received an honorable discharge from the U.S. Air Force in 1959.

In November 2004, Judge Darden received the Paul H. Buchanan, Jr. Award of Excellence by the Indianapolis Bar Foundation, and in May 2006, the Distinguished Alumni Award at the annual IU Law Alumni Association reception. He is also the recipient of two Sagamores of the Wabash, Indiana's highest distinguished citizen award.

Judge Darden is deeply involved in his church and community, serving on the boards of numerous charitable organizations. He has participated in several legal and education seminars. He is a lifetime member of the NAACP, the National Bar Association, and the American, Indiana State, and Marion County bar associations. One of the awards that he cherishes most is the recognition by his peers of being "Exceptionally Qualified" to serve as a trial court judge.

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

Today's oral argument is the 202nd case the Court of Appeals has heard "on the road" since early 2000.

Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. Margret G. Robb (Tippecanoe County)

- Judge of the Court of Appeals since July 1998

Margret G. Robb was appointed to the Indiana Court of Appeals in July 1998 by Gov. Frank O'Bannon. She holds a B.S. and M.S. in Business Economics from Purdue, and is a 1978 Magna Cum Laude graduate of Indiana University School of Law - Indianapolis.

Prior to joining the Court, Judge Robb was engaged in the general practice of law for 20 years in Lafayette and was a Chapter 11, 12 and a Standing Chapter 7 Bankruptcy trustee for the Northern District of Indiana; and the Federal Advisory Committee for the expediting of Federal Litigation. She was a registered family and civil law mediator and served as a Tippecanoe County Deputy Public Defender. She chairs the Supreme Court Task Forces on Family Courts, the development of Trial Court Local Rules, and is involved in several projects to benefit the Indiana legal system. She has also served as a member of the Indiana Board of Law Examiners, the Governance Committee of the Supreme Court IOLTA (Interest On Lawyers' Trust Accounts) Committee; the Federal Advisory Committee on Local Rules for the Federal Court for the Northern District of Indiana; and Federal Advisory Committee for the expediting of Federal Litigation.

Judge Robb has held numerous Board positions for and been an officer for the Indiana State Bar Association, Indiana Bar Foundation, Tippecanoe County Bar Association, Indianapolis Bar Association, Indianapolis Bar Foundation, American Bar Foundation, National Association of Women Judges, Indiana University School of Law at Indianapolis Alumni Association, and speaks frequently on legal topics for attorneys and other judges. Judge Robb was Founding Chair of the Governor Otis Bowen's Commission on the Status of Women; was a recipient of the 1993 Indiana State Bar Association's "Celebrating 100 Years of Women in the Legal Profession" award; the 2001 Maynard K. Hine distinguished alumni award, given in recognition of support and service to IUPUI and Indiana University; the 2004 Bernadette Perham "Indiana Women of Achievement" Award, bestowed by Ball State University in honor of one of their outstanding professors; the 2005 Indiana State Bar Association's Women in the Law Recognition Award; and the 2006 Tippecanoe County YWCA Salute to Women "Women of Distinction" Award.

Judge Robb, who was retained on the Court of Appeals by election in 2000, is married to a professor at Purdue. Their son, a graduate of the United States Naval Academy, is on active duty in the United States Navy.

The 15 judges of the Indiana Court of Appeals issue more than 2,500 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.



TODAY'S PANEL OF JUDGES

Hon. Cale J. Bradford (Marion County)

- Judge of the Court of Appeals since August 2007



Cale J. Bradford was appointed to the Court of Appeals by Governor Mitch Daniels and took his seat on August 1, 2007.

Prior to his elevation to the Court of Appeals, Judge Bradford served for more than 10 years as Judge of the Marion Superior Court, seven years in the criminal division and three in the civil division. He was twice elected presiding judge by his colleagues.

During this tenure, Judge Bradford chaired the Marion County Criminal Justice Planning Council, a group of local elected and appointed officials who recommended ways to improve the county's response to criminal justice problems, including jail overcrowding, staffing, and budget issues. His efforts led to the end of 30 years of federal oversight of the Marion County Jail and to security improvements at the county's Juvenile Detention Center.

Before joining the bench, Judge Bradford served in the Marion County Prosecutor's Office for two years, overseeing a staff of more than 100 attorneys. For five years, he was an Assistant United States Attorney for the Southern District of Indiana, prosecuting major felony drug trafficking cases. He engaged in the private practice of law from 1986 to 1991, and served as both a deputy prosecutor and public defender during his career.

A native of Indianapolis, Judge Bradford received a B.A. in labor relations and personnel management from Indiana University-Bloomington in 1982 and his J.D. from Indiana University-Indianapolis in 1986. He is the Court of Appeals' liaison to the Indiana Judges Criminal Instructions Committee, which provides guidance to judges on jury instructions in criminal cases, and a former member of both the Indiana Judges Criminal Policy Committee and the Board of Directors of the Indiana State Judicial Conference. He is a Distinguished Fellow of the Indianapolis Bar Association and has taught ICLEF seminars on trial practice for more than 10 years. From 2005 to 2007, Judge Bradford hosted "Off the Bench with Judge Cale Bradford," a legal commentary program on Marion County's government access network. He also served on the Judicial Technology and Automation Committee (JTAC), helping to draft the state judiciary's policies on technology and electronic case management.

Judge Bradford is a former director of Indianapolis's John P. Craine House, a residential alternative to incarceration for women offenders with pre-school-aged children. He is a member of the Lawrence Youth Football League Advisory Board of Directors and the Lawrence Men's Soccer Booster Club. He and his wife, a full-day kindergarten teacher, have five children.

ATTORNEYS FOR THE PARTIES

For Appellant, John B. Lind:

Robert M. Schwerd

**Hilbrich Cunningham Schwerd Dobosz & Vinovich
Highland**

Born in West Long Branch, NJ, **Robert M. Schwerd** received his B.S. in 1969 from Monmouth College in New Jersey. He graduated from Valparaiso University Law School in 1974 and was admitted to the bar in Indiana the same year. He is also admitted to practice before the United States District Court for the Northern District of Indiana.

Mr. Schwerd's law practice is primarily focused in the areas of Person Injury, Church Law, Litigation Defense, Municipal Government, Product Liability,

Criminal Defense, Admiralty, and Appellate Advocacy.

Mr. Schwerd is a former Lake County Deputy Prosecuting Attorney as well as a former public defender in the Lake County Court, Juvenile Division. He is a member of the Lake County, Porter County, and American Bar Associations. A member of the National Diocesan Attorneys Association, he is co-author of "Sexual Abuse of Minors: The Policy of the Diocese of Gary" in 1993. He also serves on the Priest Pension Board of the Diocese of Gary.

For Appellant, John B. Lind:

Benjamin D. Fryman

**Hilbrich Cunningham Schwerd Dobosz & Vinovich
Highland**

Benjamin D. Fryman is a native of Wauseon, Ohio. He graduated from Indiana Wesleyan University in Marion, Indiana, *cum laude*, in 2001 and received his law degree from Valparaiso University School of Law in 2005, where he was a member of the Valparaiso University Law Review.

Mr. Fryman is a member of the Lake County and Indiana State

Bar Associations. He was a law clerk and bailiff for Lake Superior Court and clerked for the Northern District of Indiana Federal Community Defenders.

Mr. Fryman's areas of practice include Personal Injury, Wrongful Death, Medical Malpractice, Product Liability, Litigation, and Appellate Advocacy.



ATTORNEYS FOR THE PARTIES

For Appellees, Menard, Inc. and Scotch Corporation:
Charles C. Hoppe, Jr.,
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Schererville



Charles C. Hoppe graduated with honors from Illinois Institute of Technology Chicago-Kent College of Law in 1978. He is the principal in charge of the firm's Indiana office and has tried cases in both Illinois and Indiana. He has served as lead counsel in numerous jury trials involving Structural Work Act claims, products liability, premises liability, automobile liability, municipal liability, and construction cases in the state and federal courts of Illinois and Indiana.

Mr. Hoppe has lectured widely on risk management and liability-related topics for the American Public Works Association, the Property Loss Research

Bureau, and other insurance organizations.

Mr. Hoppe is licensed to practice in the state and federal courts in Illinois and Indiana, the United States Court of Appeals for the Seventh Circuit, and the United States Supreme Court. His professional affiliations include the Federal Trial Bar, Illinois State Bar Association, Indiana State Bar Association, and Casualty Adjusters Association of Chicago. He also serves as an adjunct professor of law at Chicago Kent College of Law in Chicago.